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# Letter dated 8 October 2014 from the Permanent Representative of Argentina to the United Nations addressed to the Secretary-General

I have the honour to inform you that, under the presidency of Argentina, the Security Council will be holding an open debate on the theme "Working methods of the Security Council" on Thursday, 23 October 2014. In order to guide the debate, Argentina has prepared the attached concept paper (see annex).

I should be grateful if you would have the present letter and its annex circulated as a document of the Security Council.

(*Signed*) María Cristina Perceval
Ambassador
Permanent Representative

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## Annex to the letter dated 8 October 2014 from the Permanent Representative of Argentina to the United Nations addressed to the Secretary-General

[Original: English]

## Open debate of the Security Council on the theme "Working methods of the Security Council", 23 October 2013

### Concept paper

The working methods of the Security Council are of interest not only to Council members but also to the broader membership. In addition to being interested in improving the efficiency of the Council's work, Member States are particularly keen on the development of more democratic practices, transparency and accountability, as evidenced by the fact that these issues are raised repeatedly at the annual open debates on the working methods of the Council, as well as in specific groupings and at other meetings where that question is discussed. In the note by the President of the Security Council of 28 August 2013 (S/2013/515), the members of the Council expressed their commitment to continuing to provide opportunities to hear the views of the broader membership on the working methods of the Council, including in any open debate on the implementation of the note by the President of 26 July 2010 (S/2010/507), and to welcoming the continued participation of the broader membership in such debates.

Argentina, which has chaired the Security Council Informal Working Group on Documentation and Other Procedural Questions for two consecutive years (January 2013-December 2014), is pleased to convene this open debate to honour that commitment, as one of the highlights of its presidency of the Council for the month of October 2014.

Security Council reform, which is being debated by the General Assembly, does not constitute the subject of this open debate, which considers instead the procedures of the Council and the way the Council conducts its work.

### 1. Background

The working methods of the Security Council have developed greatly throughout the years, yet the demands of the international community continue to grow. Some issues are recurrent, both in internal discussions and in the statements of the broader membership, and are considered always in the quest for improvement. Other issues have also emerged, representing new areas of concern.

During the current chairmanship of the Informal Working Group, both recurring and new issues have been addressed.

In 2013, the Informal Working Group drafted two notes by the President: the one dated 28 August 2013 focused on dialogue with non-members of the Security Council and other bodies (S/2013/515) and the one dated 28 October 2013 dealt with consultations between the Council, the Secretariat and troop- and police-contributing countries (S/2013/630). In 2014, the Informal Working Group drafted two other notes by the President: the one dated 14 April 2014 was on the role of penholders in the drafting of Council products (S/2014/268) and the one dated

4 August 2014 was on intra-Council dialogue (S/2014/565). All four notes build upon prior decisions of the Council. Also in 2014, the Informal Working Group worked on a note by the President dated 4 June 2014 on a new issue: the handover of the chairmanships of subsidiary bodies (S/2014/393).

One of the proposals made by the Argentine chairmanship at the beginning of its term was to discuss extending the mandate of the Office of the Ombudsperson to cover other sanctions lists, that is to say, not only the list created pursuant to resolutions 1267 (1999), 1333 (2000) and 1989 (2011) (the Al-Qaida Sanctions List). That proposal did not enjoy consensus. Furthermore, the Council has to date failed to agree on a mechanism for following up on situations referred by it to the International Criminal Court. Neither issue is new, but the Council has yet to take up either.

## 2. Objectives and proposed issues for debate

For the upcoming open debate, it is proposed that delegations build on the experience of prior discussions at previous open debates on the working methods of the Security Council, wrap-up sessions and other events by assessing the progress made since the 2013 annual open debate, identifying gaps and making concrete proposals to the Informal Working Group or to the Council to enhance the efficiency, transparency and interactivity of the work of the Council. In assessing progress, it is important to consider the documents concerning the working methods of the Council agreed upon by the Informal Working Group since the 2013 open debate (S/2013/630, S/2014/268, S/2014/393 and S/2014/565) and the implementation — or lack thereof — of previously adopted notes by the President of the Council.

Delegations are invited to consider two issues that the Security Council should address in a more meaningful manner: due process and targeted sanctions, in particular the possibility of extending the mandate of the Ombudsperson to all sanctions committees; and Security Council follow-up of its referrals to the International Criminal Court.

### *Enhancing due process in sanctions regimes*

Targeted sanctions were an important United Nations response to the controversy surrounding the adverse humanitarian impact of the comprehensive economic sanctions that prevailed in the early 1990s. The purpose of targeted sanctions is to apply restrictive measures against individuals, entities or materials that are contributing to the threat to international peace and security during or immediately after a conflict. Throughout the years, in each of the categories subject to targeted sanctions — finance, travel, arms and commodities — the Security Council has adopted a number of policy innovations to improve their design and to overcome problems resulting from inadequate implementation.

As important as the requirements for effectively implementing targeted sanctions was the demand that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions. This concern was reflected in paragraph 109 of the 2005 World Summit Outcome document, which was adopted by the General Assembly in its resolution 60/1.

In response to that demand, on 19 December 2006 the Security Council adopted resolution 1730 (2006), by which it requested the Secretary-General to establish within the Secretariat (Security Council Subsidiary Organs Branch) a focal point to receive delisting requests and to perform the tasks described in the annex to that resolution. Petitioners can submit delisting requests either through the focal point process outlined in resolution 1730 (2006) or through their State of residence or citizenship. As set out in footnote 1 of the annex to resolution 1730 (2006), a State can decide that, as a rule, its citizens or residents should address their delisting requests directly to the focal point. The State does so by a declaration addressed to the Chair of the relevant sanctions committee. To date, two States, including one permanent member of the Security Council, have submitted such declarations.

In 2009, after the matter had been considered for several years by the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, the General Assembly took note of the annex to its resolution 64/115, entitled "Introduction and implementation of sanctions imposed by the United Nations". Paragraph 7 of that annex reads:

> Sanctions regimes with regard to individuals and entities should ensure that the decision to list such individuals and entities is based on fair and clear procedures, including, as appropriate, a detailed statement of case provided by Member States, and that regular reviews of names on the list are conducted; ensure, to the degree possible, maximum specificity in identifying individuals and entities to be targeted; and ensure also that fair and clear procedures for delisting exist early in sanctions regimes. Listed individuals and entities should be notified of the decision and of as much detail as possible in the publicly releasable portion of the statement of case. There should be an appropriate mechanism for handling individuals' or entities' requests for delisting.

The Office of the Ombudsperson was created by Security Council resolution 1904 (2009) and its mandate was extended by resolutions 1989 (2011), 2083 (2012) and 2161 (2014). Individuals, groups, undertakings or entities seeking to be removed from the Al-Qaida Sanctions List can submit a request for delisting to an independent and impartial Ombudsperson appointed by the Secretary-General. The Ombudsperson is mandated to gather information and to interact with the petitioner, relevant States and organizations with regard to the request. Within an established time frame, the Ombudsperson will then present a comprehensive report to the Security Council Committee pursuant to resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and associated individuals and entities. The report will detail the information gathered, including from the petitioner, and provide an analysis and the Ombudsperson's observations. The report will also set out for the Committee the principal arguments concerning the specific delisting request and contain a recommendation from the Ombudsperson on the request. Should the Ombudsperson recommend that the Committee consider delisting, the individual or entity will be delisted unless, within 60 days, the Committee decides by consensus that the individual or entity should remain on the list. If there is no such consensus, however, during that 60-day period a Committee member may request that the matter be referred to the Council. The decision of the Committee on the delisting request, setting out reasons and including any further relevant information, will be communicated to the petitioner by the Ombudsperson.

Although due process has improved with the creation of the Office of the Ombudsperson and with each new Security Council resolution, because of both human rights and security concerns, due process issues continue to be raised by Members of the Council and by the broader membership alike. Probably the most significant concern raised by Member States is that the mandate of the Ombudsperson covers only petitioners whose names are inscribed on the Al-Qaida Sanctions List.

In the seventh and eighth reports of the Office of the Ombudsperson submitted pursuant to paragraph 18 (c) of annex II to Security Council resolution 2083 (2012) (S/2014/73 and S/2014/553), dated 31 January 2014 and 31 July 2014 respectively, a number of considerations and recommendations were made on how to continue to deliver a fair process and contribute to strengthening the effectiveness and credibility of the Al-Qaida sanctions regime of the Council. While stressing that the Ombudsperson process continues to operate in compliance with the fundamental principles of fairness, in the reports it is indicated that further advances are needed in terms of due process, in particular with regard to the manner in which reasons for removing and maintaining names on the list are made and provided, including the issue of the absence of public disclosure, and the general lack of transparency in the process. Concerns were also expressed in both reports that, while the Ombudsperson had functioned independently in practice, no separate Office of the Ombudsperson had been established as mandated. Furthermore, the administrative structure relied on to implement the resolution, in terms of budget, staff management and contractual arrangements, lacked the critical features of autonomy and contained insufficient safeguards for independence. In the reports, it was concluded that due process could and must be strengthened and, at the same time, it was shown that there was merit in having an independent and impartial Ombudsperson who, in addition to and bearing in mind her experience in dealing with individual delisting requests, made recommendations to the Council to continue to strengthen due process.

In this context, participants in the open debate are encouraged to address the question of due process in targeted sanctions, in particular the possibility of extending the mandate of the Ombudsperson to all sanctions committees, building on the experience gained by the Office of the Ombudsperson with the Al-Qaida sanctions regime.

*Follow-up of Security Council referrals to the International Criminal Court*

At the Security Council open debate held on 17 October 2012 on the initiative of Guatemala on the theme "Peace and justice, with a special focus on the role of the International Criminal Court", a number of Member States called for a more efficient and vigorous follow-up to cases referred by the Council to the International Criminal Court than was contained in the Court's periodic reports, as an essential part of the responsible action taken by the Council to foster justice and accountability for serious crimes of international concern. At other open debates, many Member States have reiterated their concern about a lack of effective and responsible follow-up to cases referred by the Council to the Court.

The Rome Statute of the International Criminal Court gives the Security Council a unique jurisdictional role. By article 13 (b) of the Statute, the Court grants the Council the power, acting under Chapter VII of the Charter of the United Nations, to refer to the Court situations in which one or more crimes within the

jurisdiction of the Court (genocide, crimes against humanity or war crimes) appear to have been committed. By article 16, on the other hand, the Council is allowed to defer an investigation or prosecution for a period of 12 months after a resolution under Chapter VII of the Charter has been adopted, for reasons relating to the maintenance of international peace and security. To date, the Council has referred two situations to the Court: the situation in Darfur (resolution 1593 (2005)) and the situation in Libya (resolution 1970 (2011)). In making the referrals, the Council decided that authorities of the countries concerned should cooperate fully with and provide any necessary assistance to the Court and the Prosecutor and, while recognizing that States not party to the Rome Statute had no obligation under the Statute, urged all States and regional and other international organizations concerned to cooperate fully. Pursuant to paragraph 8 of resolution 1593 (2003) and paragraph 7 of resolution 1970 (2011), the Prosecutor of the Court is invited to report to the Council every six months on the judicial activities undertaken, including on the cooperation received or not received from both States party and States not party to the Rome Statue. In addition, the Council has received seven letters from the President of the Court relating to the obligation to cooperate with the Court. The Council has never responded to any of the Court's letters or taken any other action in response to a failure to cooperate with the Court.

In the nineteenth report of the Prosecutor of the International Criminal Court to the Security Council pursuant to resolution 1593 (2005), dated 23 June 2014, it was pointed out that, in a number of its decisions, Pre-Trial Chamber II had reiterated the following:

> Unlike domestic courts, the ICC has no direct enforcement mechanism in the sense that it lacks a police force. As such, the ICC relies mainly on the States' cooperation, without which it cannot fulfil its mandate. When the Security Council, acting under Chapter VII of the UN Charter, refers a situation to the Court as constituting a threat to international peace and security, it must be expected that the Council would respond by way of taking such measures which are considered appropriate, if there is an apparent failure on the part of States Parties to the Statute or Sudan to cooperate in fulfilling the Court's mandate as entrusted to them by the Council. Otherwise, if there is no follow-up action on the part of the Security Council, any referral by the Council to the ICC under Chapter VII of the UN Charter would never achieve its ultimate goal, namely, to put an end to impunity. Accordingly, any such referral would become futile (para. 25).

Both States party and States not party to the Rome Statute have expressed support for this view.

On 12 February 2013, in a presidential statement on the protection of civilians (S/PRST/2013/2), the Security Council, while noting that the fight against impunity and accountability for the most serious crimes of international concern had been strengthened through the work on and prosecution of those crimes in the International Criminal Court, in accordance with the Rome Statute, in ad hoc and "mixed" tribunals as well as specialized chambers in national tribunals, reiterated its call on the importance of State cooperation with those courts and tribunals in accordance with the States' respective obligations and expressed its commitment to an effective follow-up of Council decisions in that regard. The Council has requested the Prosecutor of the International Criminal Court to brief the Council

every sixth months on both referrals; but, unlike issues pertaining to the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, which have been dealt with, since 2000, by the Security Council Informal Working Group on International Tribunals, the Council has to date not conducted an effective follow-up of the referrals nor has it agreed on a follow-up mechanism.

The open debate will provide an opportunity for Member States to continue to discuss the establishment of a mechanism to demonstrate the Security Council commitment to an effective follow-up of its referrals to the Court, including by considering whether the Informal Working Group on International Tribunals should be tasked with dealing with issues pertaining to Court referrals or establishing a specific subsidiary body.

## 3. Format

The meeting will be held on Thursday, 23 October 2014, at 10 a.m., in an open debate format, in order to allow Member States to share their views on matters pertaining to the agenda item under consideration.

As an innovation compared to the open debates held in previous years, participants in the meeting will be briefed by the Ombudsperson of the Security Council Committee pursuant to resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and associated individuals and entities, Kimberly Prost, and the Prosecutor of the International Criminal Court, Fatou Bensouda.

The Ombudsperson will be invited to brief the Council on the counter-terrorism regime under her mandate and due process of law and to make recommendations for further enhancing the effectiveness of the regime.

The Prosecutor of the International Criminal Court will be invited to focus her presentation on the value of strengthened cooperation between the Security Council and the Court, in particular with regard to the follow-up of referrals, in pursuance of the shared aim of combating impunity for heinous crimes.